Written Statement of

Michael Gerhardt, Burton Craige Distinguished Professor of Jurisprudence,

University of North Carolina at Chapel Hill

Before the House Judiciary Committee,

"The Impeachment Inquiry into President Donald J. Trump:

The Constitutional Foundations for President Impeachment,"

December 4, 2019

It is an honor and a privilege to join the other distinguished witnesses to discuss a matter of grave concern to our Constitution and our country. Because this House, the people's House, has "the sole power of Impeachment," there is no better forum to discuss the constitutional standard for impeachment and whether that standard has been met in the case of the current president of the United States. As I explain in the balance of this written statement, the record compiled thus far shows that the president has committed several impeachable offenses, including bribery, abuse of power in soliciting a personal favor from a foreign leader to benefit his political campaign, obstructing Congress, and obstructing justice.

Our hearing today should serve as a reminder of one of the fundamental principles that drove the founders of our Constitution to break from England and to draft their own Constitution, the principle that in this country no one is king. We have followed that principle since before the founding of the Constitution, and it is recognized around the world as a fixed, inspiring American ideal. In his third Annual Message to Congress in 1903, President Theodore Roosevelt aptly described this principle when he declared, "No man is above the law and no man is below, nor do we ask any man's permission when we require him to obey it. Obedience to the law is demanded as a right; not asked for as a favor."

Three features of our Constitution secure the fundamental principle that no one, not even the president, is above the law. First, in the British system, the public had no choice over the monarch who ruled them. In our Constitution, the framers allowed elections to serve as one means for ensuring presidential accountability for misconduct. Second, in the British system, the king could do no wrong, and no other parts of the government could check his

misconduct. In our Constitution, the framers developed the concept of separation of powers, which consists of checks and balances designed to prevent any branch, including the presidency, from becoming tyrannical. Third, in the British system, everyone but the king was impeachable. Our framers' generation pledged their "lives and fortunes" to rebel against a monarch whom they saw as corrupt, tyrannical, and claimed entitlement to do no wrong. In our Declaration of Independence, the framers set forth a series of impeachable offenses that the King had committed against the American colonists. When the framers later convened in Philadelphia to draft our Constitution, they were united around a simple, indisputable principle that was a major safeguard for the public, "We the people," against tyranny of any kind. A people, who had overthrown a king, were not going to turn around, just after securing their independence from corrupt monarchial tyranny, and create an office that, like the king, was above the law and could no wrong. The framers created a chief executive to bring energy to the administration of federal laws but to be accountable to Congress for "treason, bribery, or other high crimes and misdemeanors."

The framers' concern about the need to protect against a corrupt president was evident throughout the constitutional convention. "Shall any man be above Justice?" Virginia delegate George Mason asked, "Above all shall that man be above it, who can commit the most extensive injustice?" Further, he queried, "Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment?" George Mason further worried that if the President "has the power of granting pardons before indictment or conviction, may he not stop inquiry and prevent detection?" James Madison responded that, "There is one security in this case to which gentlemen may not have averted: If

the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him; they can remove him if found guilty; they can suspend him when suspected, and the power will devolve on the Vice-President. Should he be suspected also, he may likewise be suspended and be impeached and removed." James Iredell from North Carolina, whom President Washington later appointed to the Supreme Court, assured his fellow delegates, the president "is of a very different nature from a monarch. He is to be [p]ersonally responsible for any abuse of the great trust placed in him." Gouverneur Morris agreed that the president "may be bribed by a greater interest to betray his trust, and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay, without being able to guard against it by displacing him." He emphasized that, "This Magistrate is not the King but the prime minister. The people are the King." James Wilson, another one of President Washington's first appointments to the Supreme Court, agreed that, "far from being above the laws, he is amenable to the laws in his private character as a citizen, and in his public character by impeachment." Madison, who would become known as the Father of our Constitution, argued for the inclusion of impeachment in our Constitution, because a president might "pervert his administration into a scheme of peculation or oppression" or "betray his trust **to foreign leaders**." William Davie, a North Carolina delegate, warned that "**If he be not impeachable whilst in office, he will spare no effort or means whatever to get himself re-elected**" (emphasis added). These aren't the words of people planning to create an unaccountable chief executive, nor of constitutional designers who thought to leave the remedy for abuse of office simply to elections. Their concerns and observations closely mirror the current questions before this House.

One such question, which has been raised in nearly every impeachment proceeding, has is what are the legitimate grounds for impeachment, conviction, and removal. The Constitution defines treason (Article III, section 3), and the term "bribery," which could be understood simply as a president's taking or offering "an undue reward to influence" on his exercise, or non-exercise, of his power. As for "other high crimes and misdemeanors," these terms derive from the British, who understood the class of cases to refer to "political crimes," which included "great" offenses against the United States, "attempts to subvert the Constitution," when the President "deviates from his duty" or "dare[s] to abuse the power invested in him by the people," breaches of the public trust, and serious injuries to the Republic.

In his influential essay in *The Federalist Papers*, Alexander Hamilton declared that impeachable offenses are "those offences which proceed from the misconduct of public men, or, in other words, the abuse or violation of some public trust" and "relate chiefly to injuries done immediately to the society itself." In his influential lectures on the Constitution, given shortly after ratification, Justice James Wilson said impeachable offenses were "*political* crimes and misdemeanors." In his equally influential *Commentaries on the Constitution*, Justice Joseph Story explained that impeachable "offenses" are "offenses, which are committed by public men in violation of their public trust and duties" and "partakes of a political character, as it respects injuries to the society in its political character."

Several themes emerge from the framers' discussions of the scope of impeachable offenses and impeachment practice. We know that not all impeachable offenses are violations of criminal statutes, and we know that not all felonies are impeachable offenses. We know

further that what matters in determining whether particular misconduct constitutes a "high crime and misdemeanor" is ultimately the context and gravity of the misconduct in question.

When we apply our constitutional law to the facts found in the Mueller Report and other public sources, I cannot help but conclude that this president has attacked each of the Constitution's safeguards against establishing a monarchy in this country. Both the context and gravity of the president's misconduct are clear: The "favor" he requested from Ukraine's president was to receive – in exchange for his release of the funds Ukraine desperately needed -- Ukraine's announcement of a criminal investigation of a political rival. The investigation was not the important action for the president; *the announcement was* because it could then be used in this country to manipulate the public into casting aside the president's political rival because of concerns about his corruption.

The gravity of the president's misconduct is apparent when we compare it to the misconduct of the one president who resigned from office to avoid certain impeachment, conviction, and removal. After more than two years of investigations in the House and Senate and by a special prosecutor, the House Judiciary Committee approved three articles of impeachment against Richard Nixon, who resigned a few days later. The first article charged President Nixon with obstruction of justice by "personally" and "through subordinates" impeding the lawful investigations into the burglary of the Democratic headquarters, covering up and concealing those responsible, and covering up and concealing "other unlawful covert activities." The Mueller Report found *at least* five instances of the president's obstruction of the Justice Department's criminal investigation into Russian interference in the 2016 election and possible collusion between the President's campaign and Russia: (1) the president's

ordering his then-White House Counsel, Don McGahn, to fire the special counsel, Mr. Mueller, in order to thwart the investigation he had been charged by the Deputy Attorney General to undertake; (2) ordering Mr. McGahn to create a false written record denying the president had ordered him to remove Mr. Mueller; (3) meeting with his former campaign manager, Corey Lewandowski, to direct him to deliver a message, which the president dictated, to then-Attorney General Sessions to curtail the Russia investigation; (4) tampering with and dangling pardons as incentives for Paul Manafort and Michael Flynn; and (5) intimidating Michael Cohen, the president's former private legal counsel, to keep from testifying against him. Taken either individually or collectively, these instances are strong evidence of criminal obstruction of justice.

The second article of impeachment approved against Richard Nixon charged him with abuse of power for ordering the heads of the FBI, IRS, and CIA to harass his political enemies. In the present circumstance, the President has engaged in a pattern of abusing the trust placed in him by the American people by soliciting foreign countries – including China, Russia, and Ukraine – to investigate his political opponents and interfere on his behalf in elections in which he is a candidate.

The third article approved against President Nixon charged that he had failed to comply with four legislative subpoenas. In the present circumstance, the President has refused to comply with and directed at least ten others in his administration not to comply with lawful congressional subpoenas, including Secretary of State Mike Pompeo, Energy Secretary Rick Perry, and Acting Chief of Staff and head of the Office of Management and Budget Mick Mulvaney. As Sen. Lindsey Graham (R-S.C.), now chair of the Senate Judiciary Committee, said

when he was a member of the House on the verge of impeaching President Bill Clinton, "The day Richard Nixon failed to answer that subpoena is the day he was subject to impeachment because he took the power from Congress over the impeachment process away from Congress, and he became the judge and jury." That is a perfectly good articulation of why obstruction of Congress is impeachable. Senator Graham dismisses the relevance of that statement now, but its relevance speaks for itself.

The president's defiance of Congress is all the more troubling due to the rationale he claims for his obstruction: His arguments and those of his subordinates, including his White House Counsel Pat Cipollone in his October 8th letter to the Speaker and three committee chairs, boil down to the assertion that he is above the law. The president himself has declared the Constitution gives him "the right to do whatever I want as president." Moreover, in his October 8th letter, Mr. Cipollone dismissed House impeachment proceedings as "constitutionally illegitimate," with the overall aim of asserting that the president of the United States has the power to shut down an impeachment inquiry. He laid out the president's grievances: The administration will not go along with what Mr. Cipollone described as a purely "partisan" inquiry; his letter decried "unfounded" allegations made by the whistleblower in his September 26, 2019 complaint and the unfairness of the impeachment inquiry; he said Democrats "seek to overturn the results of the 2016 election"; and he asserted that the July 25 phone call between Trump and Ukraine's President Volodymyr Zelensky — at the heart of the inquiry — "was completely appropriate." Mr. Cipollone condemned the House for operating "contrary to the Constitution of the United States — and all past bipartisan precedent." I am not familiar with any such precedent, and I disagree with the characterizations of the

proceedings, since the Constitution expressly says, and the Supreme Court has unanimously affirmed, that the House has "the sole power of impeachment" and that, like the Senate, has the power "to determine the rules for its proceedings."

In addition to the president's declaration that he can do no wrong and the assertions in Mr. Cipollone's October 8th letter, reportedly signed and drafted at the direction of the president, the president and his subordinates have argued further that the president is entitled to absolute immunity from any criminal procedures, *even an investigation*, for any criminal wrongdoing, including shooting someone on Fifth Avenue; the president is entitled to order everyone within the executive branch not to cooperate with and to refuse compliance with lawful directives of this Congress; the president is entitled to keep any information produced anywhere within the executive branch confidential from Congress even when acting at the zenith of its impeachment powers and even if it relates to the commission of a crime or abuse of power; and the president is entitled to shut this impeachment inquiry down – and any other means for holding him accountable – except for the one process, the next election, that he plainly tried to rig in his favor. The power to impeach includes the power to investigate, but, if the president can stymy this House's impeachment inquiry, he can eliminate the impeachment power as a means for holding him and future presidents accountable for serious misconduct. If left unchecked, the president will likely continue his pattern of soliciting foreign interference on his behalf in the next election.

The president's serious misconduct, including bribery, soliciting a personal favor from a foreign leader in exchange for his exercise of power, and obstructing justice and Congress are worse than the misconduct of any prior president, including what previous presidents who

faced impeachment have done or been accused of doing. Other presidents have done just the opposite in recognizing the legitimacy of congressional investigative and impeachment authorities. Even President Nixon agreed to share information with Congress, ordered his subordinates to comply with subpoenas to testify and produce documents (with some limited exceptions), and to send his lawyers to ask questions in the House's impeachment hearings. The fact that we can easily transpose the articles of impeachment against Nixon onto the actions of this president speaks volumes – and that does not even include the most serious national security concerns and election interference concerns at the heart of this president's misconduct.

No misconduct is more antithetical to our democracy, and nothing injures the American people more than a president who uses his power to weaken their authority under the Constitution as well as the authority of the Constitution itself. No member of this House should ever want his or her legacy to be having left unchecked a president's assaults on our Constitution. If Congress fails to impeach here, then the impeachment process has lost all meaning, and, along with that, our Constitution's carefully crafted safeguards against the establishment of a king on American soil. No one, not even the president, is beyond the reach of our Constitution and our laws.

Opening Statement of Professor Pamela S. Karlan

Mr. Chairman and members of the Committee:

Thank you for the opportunity to testify. I am the Kenneth and Harle Montgomery Professor of Public Interest Law and the Co-Director of the Supreme Court Litigation Clinic at Stanford Law School. Much of my professional life has been devoted to the law of democracy. Before becoming a law professor, I litigated voting rights cases as assistant counsel for the NAACP Legal Defense and Educational Fund. I am the co-author of several leading casebooks, among them Constitutional Law, now in its eighth edition, and The Law of Democracy: Legal Structure of the Political Process, now in its fifth edition. I have served as a Commissioner on the California Fair Political Practices Commission and as a Deputy Assistant Attorney General at the U.S. Department of Justice, where I was responsible, among other things, for reviewing the work of the Voting Section.

Twice, I have had the privilege of representing the bipartisan leadership of this Committee in voting rights cases before the Supreme Court—once when it was under the leadership of Chairman Sensenbrenner and once when it was under the leadership of Chairman Conyers. It was a great honor for me because of this Committee's key role over the past fifty years in ensuring American citizens have the ability to vote in free and fair elections. Today, you are being asked to consider whether protecting those elections requires impeaching a President. This is an awesome responsibility. But everything I know about our Constitution and its values, and my review of the evidentiary record, tells me that when President Trump invited—indeed, demanded—foreign involvement in our upcoming election, he struck at the very heart of what makes this country the "republic" to

which we pledge allegiance. That demand constituted an abuse of power. Indeed, as I want to explain in my testimony, drawing a foreign government into our election process is an especially serious abuse of power because it undermines democracy itself.

Our Constitution begins with the words "We the People" for a reason. Our government, in James Madison's words, "derives all its powers directly or indirectly from the great body of the people."[1] And the way it derives this power is through elections. Elections matter—both to the legitimacy of our government and to all our individual freedoms because, as the Supreme Court explained more than a century ago, voting is "preservative of all rights."[2]

So it is hardly surprising that the Constitution is marbled with provisions governing elections and guaranteeing governmental accountability. Indeed, a majority of the constitutional amendments we have ratified since the end of the Civil War deal with voting and terms for elective office.

Among the most important constitutional provisions is a guarantee of periodic elections for President—one every four years.[3] America has kept that promise for more than two centuries. It has done so even during wartime. For example, we invented the idea of absentee ballots so that Union troops who supported President Lincoln could stay in the field during the election of 1864. And since then, countless other Americans have fought and died to protect our right to vote.

---

[1] Federalist No. 39.

[2] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

[3] U.S. Const. art. II, § 1, cl. 1.

But the Framers of our Constitution realized that elections alone could not guarantee that the United States would remain a republic. One of the key reasons for including an impeachment power was the risk that unscrupulous officials might try to rig the election process. At the Constitutional Convention, William Davie warned that unless the Constitution contained an impeachment provision, a president might "spare no efforts or means whatever to get himself re-elected."[4] And George Mason insisted that a president who "procured his appointment in the first instance" through improper and corrupt acts should not "escape punishment, by repeating his guilt."[5] Mason was responsible for adding "high Crimes and Misdemeanors" to the list of impeachable offenses.[6] So we know that that list was designed to reach a president who acts to subvert an election—whether it is the election that brought him into office or an upcoming election where he seeks a second term.

Moreover, the Founding Generation, like every generation of Americans since, was especially concerned to protect our government and our democratic process from outside interference. For example, John Adams expressed concern with the very idea of an elected President, writing to Thomas Jefferson that "You are apprehensive of foreign Interference, Intrigue, Influence.—So am I—But, as often as elections happen, the danger of foreign Influence recurs."[7] And in his Farewell Address, President Washington warned that

---

[4] 2 Records of the Federal Convention of 1787, p. 64 (Max Farrand ed. 1911).

[5] *Id.* at 65.

[6] *Id.* at 550.

[7] Letter from John Adams to Thomas Jefferson (Dec. 6, 1787), available at https://tinyurl.com/founders-archive-gov.

"history and experience prove that foreign influence is one of the most baneful foes of republican government."[8] The very idea that a President might seek the aid of a foreign government in his reelection campaign would have horrified them. But based on the evidentiary record, that is what President Trump has done.

The list of impeachable offenses the Framers included in the Constitution shows that the essence of an impeachable offense is a president's decision to sacrifice the national interest for his own private ends.[9] "Treason" lay in an individual's giving aid to foreign enemies—that is, putting a foreign adversary's interests above the United States'. "Bribery" occurred when an official solicited, received, or offered a personal favor or benefit to influence official action—that is, putting his private welfare above the national interest. And "high Crimes and Misdemeanors" captured the other ways in which a high official might, as Justice Joseph Story explained, "disregard . . . public interests, in the discharge of the duties of political office."[10]

---

[8] Washington's Farewell Address (1796), available at https://avalon.law.yale.edu/18th_century/washing.asp. More recently, then-Judge Brett Kavanaugh pointed to this "straightforward principle: It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest . . . in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process." *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 287–88 (D.D.C. 2011), *summarily aff'd*, 565 U.S. 1104 (2012).

[9] *See* U.S. Const. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

[10] 3 Joseph Story, Commentaries on the Constitution of the United States § 762 (1833), available at https://www.constitution.org/js/js_005.htm. Justice Story added that "political offenses" for which impeachment will be "so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law. They must be examined upon very broad and comprehensive principles of public policy and duty." *Id.*

Based on the evidentiary record, what has happened in the case before you is something that I do not think we have ever seen before: a president who has doubled down on violating his oath to "faithfully execute" the laws and to "protect and defend the Constitution."[11] The evidence reveals a President who used the powers of his office to demand that a foreign government participate in undermining a competing candidate for the presidency.

As President Kennedy declared, "[t]he right to vote in a free American election is the most powerful and precious right in the world."[12] But our elections become less free when they are distorted by foreign interference. What happened in 2016 was bad enough: there is widespread agreement that Russian operatives intervened to manipulate our political process. But that distortion is magnified if a sitting President abuses the powers of his office actually to invite foreign intervention. To see why, imagine living in a part of Louisiana or Texas that's prone to devastating hurricanes and flooding. What would you think if, when your governor asked the federal government for the disaster assistance that Congress has provided, the President responded, "'I would like you to do us a favor.' I'll meet with you and send the disaster relief once you brand my opponent a criminal."? Wouldn't you know in your gut that such a president had abused his office, betrayed the national interest, and tried to corrupt the electoral process? I believe the evidentiary record shows wrongful acts on that scale here. It shows a president who delayed meeting a foreign leader and providing assistance that Congress and his own advisors agreed served

[11] *See id.* art. I, § 2, cl. 8.

[12] Special Message to Congress on Civil Rights (Feb. 28, 1963), available at https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/043/JFKPOF-043-002.

our national interest in promoting democracy and limiting Russian aggression. And it shows a president who did this to strong arm a foreign leader into smearing one of the president's opponents in our ongoing election season. That is not politics as usual—at least not in the United States or any other mature democracy. It is, instead, a cardinal reason why the Constitution contains an impeachment power. Put simply, a candidate for president should resist foreign interference in our elections, not demand it.

If we are to keep faith with the Constitution and our Republic, President Trump must be held to account.

Noah Feldman

Prepared Statement

December 4, 2019

Mr. Chairman and Members of the Committee:

My name is Noah Feldman.

I serve as the Felix Frankfurter Professor of Law at the Harvard Law School. In that capacity, my job is to study and teach the Constitution, from its origins to the present. I've written seven books, including a book on religious liberty under the Constitution; a book on the great Supreme Court justices of the mid-20th century; and a full-length biography of James Madison, often called the father of the Constitution. I'm also co-author of a casebook, Feldman and Sullivan's *Constitutional Law*, now in its 20th edition, as well as many essays and articles on constitutional subjects.

I'm here today to describe:

- why the framers of our Constitution included a provision for impeaching the president;
- what that provision means; and
- how it applies to the question before you and the American people: whether President Donald J. Trump has committed impeachable offenses under the Constitution.

I will begin by stating my conclusions:

- The framers provided for impeachment of the president because they feared that a president might abuse the power of his office to gain personal advantage; to corrupt the electoral process and keep himself in office; or to subvert our national security.
- High crimes and misdemeanors are abuses of power and public trust connected to the office of the presidency.
- On the basis of the testimony and evidence before the House, President Trump has committed impeachable high crimes and misdemeanors by corruptly abusing the office of the presidency. Specifically, President Trump abused his office by corruptly soliciting President Volodymyr Zelensky to announce investigations of his political rivals in order to gain personal advantage, including in the 2020 presidential election.

I. Why the Framers Provided for Impeachment

When the Constitutional Convention opened in late May 1787, Edmund Randolph, governor of Virginia, introducing what came to be called the Virginia Plan, a blueprint for the new government that had been designed and written in advance by James Madison. The Virginia Plan mentioned "impeachments of … national offices."[1]

[1] I Records of the Federal Convention of 1787, 21-22 (Madison) (May 29, 1787) (Max Farrand ed., 1966) [hereafter Farrand].

On June 2, when the convention was talking about the executive, Hugh Williamson of North Carolina proposed that the executive should be "removable on impeachment and conviction of mal-practice or neglect of duty."[2] The convention agreed and put the words in their working draft.

The framers were borrowing the basic idea of impeachment from the constitutional tradition of England. There, for hundreds of years, Parliament had used impeachment to oversee government officials, remove them from office for abuse of power and corruption, and even punish them.

The biggest difference between the English tradition of impeachment and the American constitutional plan was that the king of England could not be impeached. In that sense, the king was above the law, which only applied to him if he consented to follow it. In stark contrast, the president of the United States would be subject to the law like any other citizen.

The idea of impeachment was therefore absolutely central to the republican form of government ordained by the Constitution. Without impeachment, the president would have been an elected monarch. With impeachment, the president was bound to the rule of law. Congress could oversee the president's conduct, hold him accountable, and remove him from office if he abused his power.

On July 20, 1787, the topic of impeachment came up again at the constitutional convention when Charles Pinckney of South Carolina and Gouverneur Morris, representing Pennsylvania, moved to take out the provision.[3]

After Pinckney said that the president shouldn't be impeachable, William Richardson Davie of North Carolina immediately disagreed. If the president could not be impeached, Davie said, "he will spare no efforts or means whatever to get himself re-elected." Impeachment was therefore "an essential security for the good behaviour of the Executive." Davie was pointing out that impeachment was necessary to address the situation where a president tried to corrupt elections.[4]

Gouverneur Morris then suggested that the need to run for re-election would be a sufficient check on a president who abused his power. He was met with stiff opposition from George Mason of Virginia, the man who had drafted Virginia's Declaration of Rights and a fierce republican critic of overweening government power. Mason told the delegates that "No point is of more importance than that the right of impeachment should be continued." He gave a deeply republican explanation: "Shall any man be above Justice?" he asked. "Above all shall that man be above it, who can commit the most extensive injustice?"[5]

Like Davie, George Mason was especially concerned about the danger that a sitting president posed to the electoral process. He went on to say that presidential electors were in danger of "being corrupted by the Candidates." This danger, he said, "furnished a peculiar reason in favor of impeachments whilst in office. Shall the man who has practised corruption & by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?"[6]

After Benjamin Franklin also spoke in favor of impeachment, something remarkable happened: Gouverneur Morris changed his mind. Morris had been convinced by the argument that elections were not, on their own, a sufficient check on the actions of a president who tried to pervert the course of the

[2] I Farrand, 88 (Madison) (June 2, 1787).
[3] II Farrand 64 (Madison) (July 20, 1787).
[4] Id.
[5] Id. at 65.
[6] Id.

electoral process. Morris told the other delegates that he now believed that "corruption & some few other offences to be such as ought to be impeachable."[7]

James Madison, the lead architect of the Constitution, now spoke. He insisted that it was "indispensable that some provision should be made for defending the Community against the incapacity, negligence or perfidy of the chief Magistrate." Standing for reelection "was not a sufficient security." The president, Madison said, "might lose his capacity after his appointment. He might pervert his administration into a scheme of peculation or oppression. He might betray his trust to foreign powers." And if the president lost his capacity or acted corruptly, Madison concluded, that "might be fatal to the Republic."[8]

The upshot of this conversation in the constitutional convention was that the framers believed that elections were not a sufficient check on the possibility of a president who abused his power by acting in a corrupt way. They were especially worried that a president might use the power of his office to influence the electoral process in his own favor. They concluded that the Constitution must provide for the impeachment of the president to assure that no one would be above the law.

Now that the framers had settled on the necessity of impeachment, what remained was for them to decide exactly what language to use to define impeachable offenses. On September 4, a committee replaced the words "malpractice or neglect of duty" with the words "treason or bribery."

On September 8, George Mason objected forcefully that the proposed language was not broad enough. The word treason had been narrowly defined by the Constitution, he pointed out, and so would "not reach many great and dangerous offences." He drew the other delegates attention to the famous impeachment trial that was taking place at the time in England – that of Warren Hastings, the former governor general of Bengal. Hastings was "not guilty of Treason," Mason pointed out, but of other alleged misdeeds. Mason added that "Attempts to subvert the Constitution may not be Treason as above defined." Mason proposed to add the words "or maladministration" after "treason or bribery."[9]

Madison replied to Mason that the word "maladministration" was "vague" and amounted to "tenure during pleasure of the Senate." In response, Mason withdrew the word "maladministration" and substituted "other high crimes & misdemesnors [sic] against the State."[10] The words "against the state" were then changed almost immediately to "against the United States," Later, the convention's committee on style settled on the final language, which says that

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.[11]

II. What the Constitution Means by High Crimes and Misdemeanors

[7] Id. and see also id. at 68.
[8] Id. at 65-66.
[9] II Farrand, 550 (Madison) (September 8, 1787). The term "maladministration" likely came from the great English legal writer William Blackstone, who described a "high misdemeanor" defined as "mal-administration of such high officers, as are in public trust and employment." Officers charged with this conduct, Blackstone had written, are "usually punished by the method of parliamentary impeachment." IV Blackstone *121.
[10] Id. at 551.
[11] Constitution of the United States, Art. II sec. 4.

High Crimes and Misdemeanors

The words "high crimes and misdemeanors" had a well-understood meaning from centuries of English impeachment trials. They were in common use in impeachments. Indeed, those words had just been used by the House of Commons in impeaching Warren Hastings – the impeachment to which Mason referred minutes before he proposed the words "high crimes and misdemeanors."[12]

The phrase "high crimes and misdemeanors" was an expression with a concrete meaning. The word "high" in the phrase modified both words that followed: "high crimes" and "high misdemeanors." The word "high" meant "connected to high political office." As Alexander Hamilton explained in Federalist No. 65, the phrase "high crimes and misdemeanors" referred to

> those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[13]

Thus, the essential definition of high crimes and misdemeanors is the abuse of office. The framers considered the office of the presidency to be a public trust. Abuse of the office of the presidency is the very essence of a high crime and misdemeanor.

To be clear, when the framers chose these words "high crimes and misdemeanors," there was no longer any meaningful difference between "high crimes" and "high misdemeanors." The words were used interchangeably in the Hastings impeachment. The distinction in criminal law between felonies and misdemeanors is not implicated in the framers' phrase.

Abuse of Trust for Personal Advantage

The classic form of the high crime and misdemeanor of abuse of office is using the office of the presidency for personal advantage or gain, not for the public interest.

When the framers specifically named bribery as a high crime and misdemeanor, they were naming one particular version of this abuse of office that was familiar to them.

Two of the most prominent English impeachment trials known to the framers both involved bribery. One was the impeachment trial of Warren Hastings, to which George Mason referred by name at the convention. Hastings was impeached for, among other things, "corruption, peculation, and extortion."[14] The major allegation associated with this impeachment article was that he had solicited and received bribes or gifts from people in Bengal while serving as governor general.

The other was the 1725 impeachment of Lord Macclesfield, the Lord Treasurer of England, for taking bribes or payments to sell offices. There, too, bribery was the central issue. The articles of impeachment

[12] As for the word treason, the framers wanted to differentiate themselves from English tradition, so they defined that term specifically in the Constitution.
[13] Federalist No. 65 (Hamilton), The Federalist Papers, 396 (Clinton Rossiter ed., 1961).
[14] House of Commons, Article of Impeachment, Article VI, House of Lords Sessional Papers, 1794-95, 34-36 (Torrington ed. 1974).

charged Macclesfield with taking bribes to sell offices under color of office – that is, while he occupied the official role of treasurer.[15]

Other Abuses of Office

Beyond the case of abuse of office for personal gain, the framers understood that abuse of office could take a variety of other forms. Other forms of abuse of office include the use of the office of the presidency to corrupt the electoral process or to compromise the national interest or national security.

It is important to note that the traditional meaning of high crimes and misdemeanors was *not* restricted to acts defined as ordinary crimes by statute. The language was deliberately meant to be flexible enough to incorporate a range of abuses of power that endanger the democratic process, because the Framers understood that they could not perfectly anticipate every possible abuse of power by the president.

III. How High Crimes and Misdemeanors Applies to President Trump's Alleged Conduct

The Constitution specifies that House of Representatives shall have "the sole Power of Impeachment." It is therefore the constitutional responsibility of the members of the House to determine whether they believe the sworn testimony that has been offered in the course of this impeachment inquiry and to decide whether to impeach President Trump. My role is not to address the determination of credibility that is properly yours. Rather, my job is to describe how the constitutional meaning of impeachable offenses applies to the facts described by the testimony and evidence before the House.

President Trump's conduct described in the testimony and evidence clearly constitutes an impeachable high crime and misdemeanor under the Constitution. According to the testimony and to the publicly released memorandum of the July 25, 2019, telephone call between the two presidents, President Trump abused his office by soliciting the president of Ukraine to investigate his political rivals in order to gain personal political advantage, including in the 2020 presidential election.

This act on its own qualifies as an impeachable high crime and misdemeanor.

The solicitation constituted an abuse of the office of the presidency because Pres. Trump was using his office to seek a personal political and electoral advantage over his political rival, former vice president Joe Biden, and over the Democratic Party. The solicitation was made in the course of the president's official duties. According to the testimony presented to the House, the solicitation sought to gain an advantage that was personal to the president. This constitutes a corrupt abuse of the power of the presidency. It embodies the framers' central worry that a sitting president would "spare no efforts or means whatever to get himself re-elected."

[15] The Tryal of Thomas Earl of Macclesfield, In the House of Peers, For High Crimes and Misdemeanors; Upon an Impeachment by the Knights Citizens and Burgesses in Parliament Assembled, In the Name of Themselves and of All the Commons of Great-Britain. Begun the 6th Day of May 1725, And from Thence Continued by Several Adjournments Until the 27th Day of the Same Month. Published by Order of the House of Peers. London: Printed by Sam. Buckley in Amen-Corner, 1725.

Soliciting a foreign government to investigate an electoral rival for personal gain on its own constitutes an impeachable high crime and misdemeanor under the Constitution.

The House heard further testimony that President Trump further abused his office by seeking to create incentives for Ukraine to investigate Vice President Biden. Specifically, the House heard testimony that President Trump

- Placed a hold on essential U.S. aid to Ukraine, and conditioned its release on announcement of the Biden and Crowdstrike investigations; and
- Conditioned a White House visit sought by President Zelensky on announcement of the investigations.

Both of these acts constitute high crimes and misdemeanors impeachable under the Constitution. By freezing aid to Ukraine and by dangling the promise of a White House visit, the president was corruptly using the powers of the presidency for personal political gain. Here, too, the president's conduct described by the testimony embodies the framers' concern that a sitting president would corruptly abuse the powers of office to distort the outcome of a presidential election in his favor.